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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1439

WILLIAM RILEY HUGHES,
Appellant,

V E R S U S

THE STATE OF OKLAHOMA,
Appellee.

ON APPEAL FROM THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

BRIEF OF APPELLEE

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December, 1978

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	1
STATEMENT OF THE CASE	1
INTRODUCTION OF ISSUE	2
ARGUMENT	3
CITATIONS OF AUTHORITY	4
CONCLUSION	7
CERTIFICATE OF SERVICE follows Brief.	

TABLE OF AUTHORITIES

Cases

Baldwin v. Fish and Game Commission of Montana, U.S., 98 S.Ct. 1852, 56 L.Ed.2d 352 (1978)	6, 7
City of Philadelphia v. New Jersey, U.S., 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978)	7
Dahnke-Walker Milling v. Bondurant, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239 (1921)	5
Douglas v. Seacoast Products, Inc., 431 U.S. 265, 97 S.Ct. 1740, 52 L.Ed.2d 304 (1977)	6
Foster-Fountain Packing Company v. Haydel, 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147 (1928)	4, 5, 7
Geer v. Connecticut, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793 (1896)	5, 6, 7
Hood and Sons v. DuMond, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1948)	6
Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)	7

AUTHORITIES CONTINUED	PAGE
Laccste v. Department of Conservation, 263 U.S. 545, 44 S.Ct. Rptr. 186, 68 L.Ed. 437 (1928)	7
Missouri v. Holland, 252 U.S. 416, 40 S.Ct. 382, 64 L. Ed. 641 (1920)	6
Mullaney v. Anderson, 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952)	7
State v. Kemp, 73 S.D. 458, 44 N.W.2d 214 (1950)	7
Takahashi v. Fish and Game Commission, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948)	7
Toomer v. Witsell, 334 U.S. 385, 68 S.Ct. 1156, 92 L. Ed. 1460 (1948)	6
Statutes	
29 O.S. 1974, §4-115B	2, 8

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QUESTION PRESENTED

Is 29 O.S. Supp. 1974, Section 4-115B repugnant to
the Commerce Clause, Art. I, Section 8, Cl. 3, United States
Constitution?

STATEMENT OF THE CASE

Appellee accepts appellants Statement of the Case and
agrees that the opinion below, which appears at 572 P.2d
573, fairly and correctly states the facts.

INTRODUCTION OF ISSUE

The Oklahoma statute in issue, 29 O.S. 1974, §4-115B, hereinafter referred to as Section B, provides:

"B. No person may transport or ship minnows for sale outside the State which were seined or procured within the waters of this State except that:

"1. Nothing contained herein shall prohibit any person from leaving the State possessing three (3) dozen or less minnows;

"2. Nothing contained herein shall prohibit sale and shipment of minnows raised in a regularly licensed commercial minnow hatchery."

The crux of appellant's contention is that Oklahoma cannot constitutionally prohibit the export of minnows *ferae naturae* from Oklahoma if sale thereof is permitted within the State, concluding that Section B lacks a justifiable State interest and is directed to a policy of economic protectionism.

In response, appellee emphasizes the plain language of Section B prohibits the transporting of these minnows for sale outside the State, whether the transporter purchased them in Oklahoma as in this case, or whether the transporter personally seined or otherwise captured the minnows from Oklahoma waters.

ARGUMENT

The pivotal factual basis for appellant's argument is twofold, the first being that Oklahoma permits minnows *ferae naturae* to be sold intrastate, but does not permit the possessor to transport them out of state for resale; the second is that Oklahoma permits hatchery minnows to be freely exported for sale, while barring the exportation of natural minnows, except for three dozen, concluding that "Oklahoma's law places an embargo on natural minnows for a business reason, which serves only those businessmen involved and does not serve the people of Oklahoma" (Brief, pages 10-12).

Appellee readily concedes Section B seeks to prevent the commercial export of natural minnows, but strongly disagrees with appellant's contention that the statute lacks a justifiable State interest and his conclusion that it is directed to a policy of economic protectionism.

The purpose and net effect of Section B is apparent. Natural minnows, which serve as the natural food supply for other fish in their natural habitat, are captured and sold, but returned to Oklahoma waters in the form of bait. This procedure serves to accommodate the recreational fisherman, while preserving the habitat and balance of aquatic wildlife provided by nature. The obvious purpose of permitting sale is to provide a practical vehicle to serve the recreational fisherman, rather than to provide for commercial exploitation. In support of this view, the prohibition within Section B is not limited to those natural minnows purchased within the State, but to all natural minnows, whether purchased, seined or otherwise procured from Ok-

lahoma waters. Further, this prohibition notably applies to all persons, including Oklahoma residents. Finally, the exception providing that any person may leave the State possessing three (3) dozen or less minnows could not arguably provide a loop-hole for commercial enterprise, but certainly would accommodate the recreational fisherman who may desire to fish in waters bordering a sister state, such as Lake Texoma.

Of course, the role of the minnow population as a source of food supply for gamefish is but one factor. Other apparent factors which must be considered are the sources upon which minnows feed, the increase of these sources due to reduced minnow population and the resulting effect upon the habitat. The difficulty is that the influence of the minnow population upon the balance provided by nature does not readily lend itself to measurable objective analysis, even where man is confident that he has knowledge of all pertinent facts. Since hatchery minnows are not seined from local waters, Oklahoma has no interest in preventing the free export thereof.

CITATIONS OF AUTHORITY

If Oklahoma permitted commercial export of natural minnows by residents, then *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147 (1928), would clearly be on point to condemn Section B. However, the holding therein not only rests upon this distinction, but the rationale therein supports the very crux of Oklahoma's argument here that natural minnows are conserved for Oklahoma waters, where resident or non-resident may en-

joy the fruits of a protected habitat, but neither is permitted to take these minnows out of the state for commercial purposes. In *Foster*, 278 U.S. at 12-13, 73 L.Ed. at 154, this Court contrasted the case then before it with *Geer v. Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793 (1896), and cases cited therein, stating in pertinent part:

"The purpose of the Louisiana Enactment differs radically from the Connecticut law there upheld. It authorizes the shrimp meat and bran, canned and manufactured within the State, freely to be shipped and sold in interstate commerce. . . . As representative of its people, the state might have retained the shrimp for consumption and use therein. *But, in direct opposition to conservation for intrastate use, this enactment permits all parts of the shrimp to be shipped and sold outside the state.* The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi plants. . . . Clearly such authorization and the taking in pursuance thereof put an end to the trusts upon which the state is deemed to own or control the shrimp for the benefit of its people." (Emphasis added)

Thus, Louisiana had effectively reserved for domestic canneries the commercial exploitation of raw shrimp for interstate sale, while in the instant case, Oklahoma does not permit commercial export of minnows *ferae naturae*, directly or indirectly by anyone, resident or non-resident.

In other decisions cited by appellant, some involve subject matter where the commercial object is clearly not in dispute, *Dahnke-Walker Milling v. Bondurant*, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239 (1921) (Contract for wheat);

Hood and Sons v. DuMond, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1948) (Receiving depot for milk); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 97 S.Ct. 1740, 52 L.Ed. 2d 304 (1977) (Commercial fishing license); *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948) (Commercial shrimp boats); and these cases are clearly distinguishable.

Appellant also cites *Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920), where Missouri sought to invalidate the federal Migratory Bird Treaty as being repugnant to the Tenth Amendment, U.S. Constitution. Noting that a national interest of nearly the first magnitude was involved, this Court simply reaffirmed the dual sovereignty concept that the federal government may act to protect a matter of national interest, even though individual states have an interest in the regulation of the same subject matter. The case is particularly inapposite.

Finally, appellant cites *Baldwin v. Fish and Game Commission of Montana*, ____ U.S. ____, 98 S.Ct. 1852, 56 L.Ed.2d 352 (1978), as authority that the "ownership doctrine" of *Geer* is no longer the law when subjected to a Commerce Clause attack (Brief, pg. 15). With all due respect, appellee submits that appellant's conclusion is premised upon fallacious semantics, particularly as applied to this case. Although State "ownership" may no longer be acceptable as a descriptive term of valid state interests in wildlife, this Court strongly reaffirmed the continued viability of these interests, 56 L.Ed.2d at 367, while appellant has cited no decision since *Geer* which has addressed a commerce clause or other constitutional claim analogous to the circumstances presented here. Indeed, appellee has

found none, as reflected in the case distinctions heretofore cited and, e.g., *City of Philadelphia v. New Jersey*, ____ U.S. ____, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978), where the state permitted residents, but prohibited non-residents to dispose of waste; *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), which involved the grading of interstate apples; *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948) and *Mullaney v. Anderson*, 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952), regarding commercial fishing licenses.

Conversely, this Court has consistently upheld internal state regulation concerning wildlife, e.g., *Geer v. Connecticut*, supra (Commerce clause); *Lacoste v. Department of Conservation*, 263 U.S. 545, 44 S.Ct. Rptr. 186, 68 L.Ed. 437 (1928) (Commerce clause); *State v. Kemp*, 73 S.D. 458, 44 N.W.2d 214 (1950), appeal dismissed, 340 U.S. 923, 71 S.Ct. 498, 95 L.Ed. 667 (1951) (privileges and immunities); *Baldwin v. Montana*, supra (privileges and immunities; equal protection), except where the state regulation was clearly a subterfuge to deprive non-residents from the economic benefits of interstate commerce accorded residents as in *Foster v. Haydel*, supra.

CONCLUSION

This Court will determine the necessary operation and effect of a state law upon a commerce clause challenge, *Lacoste v. Department of Conservation*, supra, and in determining what is interstate commerce, the courts look to practical considerations and the established course of business, *Foster v. Haydel*, supra.

Appellee submits the purpose, operation and practical effect of Section B is readily apparent as a conservation measure and the federal Constitution does not require that wildlife must be depleted or endangered to justify such conservation. Indeed, truly effective conservation guards against depletion that may cause wildlife to become endangered in the first instance.

Appellee further submits the Federal Commerce Clause does not require Oklahoma to leave non-residents free to transport natural minnows out of state for commercial purposes, while her own citizens are denied this privilege under the identical statute in issue, 29 O.S. Supp. 1974, §4-115B.

In short, no decision rendered by this Court has mandated that sovereign states surrender control of their *animus ferae naturae* where the subject matter has never been introduced into interstate commerce. Appellee prays the judgment of the Oklahoma court be affirmed.

Respectfully submitted,

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December, 1978

CERTIFICATE OF SERVICE

I, Bill J. Bruce, a member of the Bar of the Supreme Court of the United States, certify that three (3) copies of the attached Brief were air mailed with sufficient postage prepaid on the _____ day of December, 1978, to the following counsel for appellant:

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